IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 82 of 2001
with
TAX APPEAL No 41 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DY. C. I. T. (ASST.)

Versus

MADHU SILICA PVT. LTD.

Appearance:
MR MANISH R BHATT for Petitioner
MR SN SOPARKAR for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision: 23/04/2001

COMMON JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

1. The revenue has preferred the aforesaid Tax Appeal Nos.82 of 2001 and 41 of 2001. We have taken both these appeals for final hearing and disposal as the assessee is the same and the question involved is the same but for the different years.

2. The assessee company is engaged in manufacture of precipitated silica from Sodium Silica at its factory at Bhavnagar. Sodium Silica can not be used for toothpaste, however, precipitated Silica can be used for manufacturing toothpaste. The end product from the input is to be seen. Deduction under section 80HH, 80I and 32A has been claimed by the assessee. The assessing officer denied the benefit under sections 80HH, 80I and 32A of the Income-Tax Act. The Tribunal allowed the appeals and hence the revenue has raised two questions in Appeal No. 81 of 2001 as under :

"(A) "Whether, the Appellate Tribunal has substantially erred in law in holding that the assessee engaged in manufacturing of precipitated silica can be considered to be engaged in manufacturing activities and is entitled for deduction u/s.80HH and 80I of the Act ?"

(B) "Whether, the Appellate Tribunal has substantially erred in law in holding that the assessee is entitled to the claim of investment allowance u/s.32A of the Act?"

3. In Tax Appeal No.41 of 2001 the substantial question as found by the Court is as under :

"Whether on the facts and circumstances of the case the Appellate Tribunal has substantially erred in law in holding that assessee is engaged in manufacturing of precipitated silica can be considered to be engaged in manufacturing so as to entitle to deduction under section 32A of the Income-Tax Act?"

The Tribunal examined the matter with a view to find out whether the assessee can be said to be a manufacturer or not. The Tribunal considered the

Notification No.23/55 dated 29/11/1955 whereby several minerals including silica were exempted from excise duty. The exemption was not on account of manufacturing process. The Tribunal in its order has referred that the Collector of Customs as well as Central Excise and Gold Control Appellate Tribunal held that precipitated silica is covered by exemption Notification and it is not laid down that precipitated silica produced by the assessee is not manufactured product. The Tribunal has noted that the process of manufacture of precipitated silica produced by the assessee as found in para 9 of the order placed before the Tribunal and also in para 15 of the decision of Central Excise and Gold Control Appellate Tribunal; and several other aspects were taken into consideration by the Tribunal including the documents, 10 in number, which are referred by the Tribunal in para 6.

4. It appears that the contention before the Tribunal on behalf of the revenue was that the assessee is not a manufacturer of precipitated silica and there is no essential difference between the commodity consumed and commodity produced. It was canvassed that the physical and chemical properties of commodity consumed and commodity produced must be different. The assessee pointed out the distinction between the two. The entire process of manufacturing of precipitated silica has been reproduced in para 8 stage-wise. It is in view of the material placed before the Tribunal, the Tribunal arrived at a conclusion that though precipitated Silica and the silica have the same chemical formula i.e. (s102) precipitated Silica is the outcome of manufacturing activity. It appears to us that in view of the stage-wise process pointed out to the Tribunal, the Tribunal has arrived at a conclusion and has held that use is also different. The Tribunal also pointed out that the manufacture and the process have no clearly demarcated field. The Tribunal was aware that if end product is commercially known as a different product then the process would be a manufacturing process. It is in view of these facts and circumstances the Tribunal arrived at a conclusion.

5. Mr.Nayak, learned Counsel appearing for the revenue contended that in view of the decision of this Court in case of Commissioner of Income-Tax v. Kutch Oil and Allied Industries Pvt.Ltd., reported in 163 I.T.R. 237, it cannot be said that the assessee is engaged in manufacturing process. At page 239 the Court examined the definition of the expression "industrial company" given in section 2(8)(c) of the Finance Act,1974.

Reading the phrase in definition "engaged in the manufacture or process of goods" would include processing simpliciter in the definition of industrial company. The Court pointed out that whether the activity carried on by the assessee company was of manufacturing or processing would be in question. There is no dispute on the point that even if the assessee company is engaged in the activity of the processing of the goods, it would come within the definition of "industrial company". In that view of the matter, if the activity of the assessee-company comes within the meaning of processing of the goods, it would not be necessary to further examine whether it would be manufacturing goods or not, and therefore, in our opinion, this judgment is of no assistance to the Counsel for the revenue.

6. It would be necessary at this stage to point out what section 32A states to examine the case. Sub-section (2)(iii) of section 32A being relevant that part is reproduced :

> "(iii) in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule."

7. It prima facie points out that the assessee must be an industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, therefore, the end product would be relevant aspect to be taken into consideration. Mr.Nayak, learned Counsel appearing for the revenue drew our attention to the decision of the Apex Court in the case of Hotel and Allied Traders Pvt.Ltd. v. Commissioner of Income-Tax, reported in 245 I.T.R. 539, wherein the unit was engaged in preparing food packets or selling the same or preparing foodstuffs for serving in the hotel it was held there being no question of manufacture or production the benefit was not extended. The raw material at the most is processed so as to make it eatable. The foodstuff prepared by cooking or by any other process from raw materials such as cereals, pulses, vegetables, meat or the like cannot be regarded as a commercially distinct commodity and it cannot be held that such foodstuff is manufactured or produced. The Court further pointed out that difference between an industrial undertaking and the

trading activity of the assessee which is also required to be borne in mind. In our opinion, this decision is of no assistance to the revenue.

8. Mr.Nayak further states that the Apex Court in the case of Lucky Minmat Pvt.Ltd. v. Commissioner of Income-Tax, reported in 245 I.T.R.830, has examined the question about the manufacture or production of article in case of mining of lime stone and marble blocks and cutting and sizing them. The Court pointed out as under :

> "We have been shown the statements of case in the present matter as also in the matter of Best Chem and Limestone Industries Pvt.Ltd.'s case [1994] 210 ITR 883 (Raj) and are satisfied that the Tribunal has found as aforestated. There was, therefore, clearly a distinction on the facts. The conversion into lime and lime dust or concrete by stone crushers could legitimately be considered to be a manufacturing process while the mere mining of limestone and marble and cutting the same before it was sold in the market could not be so considered."

9. Thus, it is very clear that even if lime stone is converted into lime dust legitimately it can be considered to be a manufacturing process. The chemical value remains the same but the end product is different.

10. Mr.Nayak further submitted that before the Central Excise Authority it was contended that it was a mineral. Mr.Nayak further submitted that even precipitated silica has been considered as a mineral as contended by the assessee before the Central Excise Authorities and therefore, assessee cannot have different stand before the different authorities. In our opinion, this contention has no merit as in the central excise case, what was required to be considered was whether the article is a mineral or not and if it is a mineral then exemption has been granted by the excise authorities in accordance with the Notification or not. The learned Counsel submitted that earlier the matter was admitted and that matter was called for hearing with this matter. It is required to be noted that when there are common questions involved, the matters should be decided by the same Court so as to avoid any conflicting view. Is it the say of the revenue that after the questions are framed the matters must be kept in the cold storage ? Is

it the say of the revenue that once the matter is admitted, in subsequent appeal without application of mind the Court must admit the matter ? We have heard the learned Counsel for the parties. Full hearing was afforded and therefore it is not just and proper to say that once matter is admitted, subsequent matter should be admitted even after full hearing.

11. Mr.S.N.Soparkar, learned Counsel appearing for the appellant submitted that the Tribunal had arrived at a conclusion after considering the material placed on record, and therefore, according to him there is no error committed by the Tribunal much less an error of law. Court finds that there is no substantial question of law.

12. In our opinion the Tribunal on appreciation of evidence and applying the correct test after considering the procedure of manufacture had arrived at a conclusion, hence, our answer would be in favour of the assessee and against the revenue with regard to all the three questions. The appeals are dismissed.

Sd/- Sd/-

(B.C.Patel,J) (D.A.Mehta, J)

m.m.bhatt